

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF ANN ARBOR EMPLOYEES' RETIREMENT SYSTEM,  Plaintiff,  v.  ACCURAY INC., et al.,  Defendants.	No. C 09-03362 CW  ORDER CONSOLIDATING CASES, APPOINTING THE ACCURAY INVESTOR GROUP AS LEAD PLAINTIFF, AND APPROVING LEAD PLAINTIFF'S SELECTION OF COUNSEL
--	---

Currently pending before this Court are three related securities fraud class actions. Plaintiffs the Lapidus Group, Rick Larson and the Accuray Investor Group have filed competing motions for appointment as lead plaintiff. Plaintiffs also move to consolidate the related cases for all purposes. The motions were decided on the papers. Having considered all of the papers filed by the parties, the Court consolidates the related actions for all purposes, appoints Plaintiff Accuray Investor Group as lead Plaintiff and approves Accuray's selection of lead class counsel.

BACKGROUND

Defendant Accuray Incorporated designs, develops and sells the CyberKnife system, an image-guided robotic radio surgery system for the treatment of solid tumors. The CyberKnife system combines

1 continuous image-guidance technology with a compact linear  
2 accelerator to deliver high doses of radiation to a tumor from  
3 different directions.

4 According to Plaintiffs' complaint, Defendant misrepresented  
5 and failed to disclose material information concerning the quality  
6 and realistic likelihood of fulfillment of contracts its "backlog."  
7 The backlog is the direct revenue that Defendant expects to receive  
8 from the sale and servicing of the CyberKnife system.

9 Specifically, Plaintiffs allege that Defendant misrepresented  
10 and/or failed to disclose the following adverse facts: (1) at the  
11 time of Defendant's IPO, it changed its definition of backlog to  
12 include contingent as well as non-contingent contracts;  
13 (2) beginning in the fiscal quarter ending March 31, 2007 (at the  
14 time of the IPO), the Company reported backlog that consisted of  
15 both contingent and non-contingent backlog, thereby increasing the  
16 total reported backlog; (3) Defendant materially overstated the  
17 amount of its backlog; (4) Defendant reported as backlog orders for  
18 the CyberKnife system that did not have a substantially high  
19 probability of being booked as revenue; (5) a significant portion  
20 of commissions paid to CyberKnife sales personnel were earned  
21 before those potential sales were booked as revenue;  
22 (6) Defendant's sales personnel entered into contingent contracts  
23 for CyberKnife systems that did not have a substantially high  
24 probability of being booked as revenue; (7) Defendant did not have  
25 adequate internal controls and procedures to ensure that potential  
26 orders reported as backlog had a substantially high probability of  
27 being booked as revenue; and (8) based on the foregoing, Defendant  
28 lacked a reasonable basis for its positive statements about the

1 Company, its backlog, earnings, operations and prospects.  
2 Defendant allegedly overstated its backlog by \$127 million during  
3 the last three quarters of fiscal 2008.

4 DISCUSSION

5 I. Consolidation

6 Federal Rule of Civil Procedure 42(a) permits consolidation of  
7 "actions involving a common question of law or fact." To determine  
8 whether to consolidate, a court weighs the interest in judicial  
9 convenience against the potential for delay, confusion, and  
10 prejudice caused by consolidation. See Southwest Marine, Inc. v.  
11 Triple A Machine Shop, Inc., 720 F. Supp. 805, 807 (N.D. Cal.  
12 1989). "Consolidation is within the broad discretion of the  
13 district court." In re Adams Apple, Inc., 829 F.2d 1484, 1487 (9th  
14 Cir. 1987).

15 No party to these actions objects to their consolidation.  
16 Plaintiffs proceed against the same Defendants on the same legal  
17 theories. Furthermore, the factual allegations in each complaint  
18 are virtually identical and, as a result, the same discovery will  
19 be relevant to all of the actions. Under these circumstances,  
20 consolidation will expedite the proceedings and avoid unnecessary  
21 duplication and expense. Therefore, the Court consolidates the  
22 related cases for all purposes.

23 II. Appointment of Lead Plaintiff and Lead Counsel

24 The PSLRA provides that, as soon as practicable after a  
25 decision on a motion to consolidate is rendered, the court shall  
26 appoint as lead plaintiff "the member or members of the purported  
27 plaintiff class that the court determines to be most capable of  
28 adequately representing the interests of the class members." 15

1 U.S.C. § 78u-4(a)(3)(B)(i). It further provides that the court  
2 shall adopt a presumption that the most adequate plaintiff is the  
3 person or group of persons that

4 (aa) has either filed the complaint or made a motion in  
5 response to a notice under subparagraph (A)(i);<sup>1</sup>

6 (bb) in the determination of the court, has the largest  
7 financial interest in the relief sought by the class; and

8 (cc) otherwise satisfies the requirements of Rule 23 of  
9 the Federal Rules of Civil Procedure.

10 Id. § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted  
11 only upon proof that the presumptively most adequate plaintiff

12 (aa) will not fairly and adequately protect the interests  
13 of the class; or

14 (bb) is subject to unique defenses that render such  
15 plaintiff incapable of adequately representing the class.

16 Id. § 78u-4(a)(3)(B)(iii)(II). The party chosen as lead plaintiff  
17 "shall, subject to the approval of the court, select and retain  
18 counsel to represent the class." Id. § 78u-4(a)(3)(B)(v).

19 The Accuray Investor Group contends that it lost over \$4  
20 million from transactions in Accuray common stock during the class  
21 period. By contrast, Mr. Larson and the Lapidus Group allege  
22 losses of \$186,969 and \$72,600 respectively.<sup>2</sup> Thus, the Accuray

---

23 <sup>1</sup> The Act requires that the plaintiff or plaintiffs in the  
24 first filed action cause to be published, not later than twenty  
25 days after the date on which the complaint is filed, a notice  
26 advising members of the purported plaintiff class of the pendency  
27 of the action, the claims asserted therein, and the purported class  
28 period. See 15 U.S.C. § 78u-4(a)(3)(A)(i)(I). Not later than  
sixty days after the date such notice is published, any member of  
the purported class may move the court to serve as lead plaintiff  
of the purported class. See id. § 78u-4(a)(3)(A)(i)(II). These  
motions for appointment as lead plaintiff were timely filed within  
sixty days of that date.

<sup>2</sup>The Lapidus Group did not file an opposition and appears to  
(continued...)

1 Investor Group argues that, of those seeking appointment as lead  
2 plaintiff, it has the largest financial interest in the relief  
3 sought. In addition, the Accuray Investor Group contends that it  
4 satisfies the requirements of Rule 23 because its members' claims  
5 are typical of the claims of the class. Lastly, it argues that Mr.  
6 Larson and the Lapidus Group have adduced no proof that the Accuray  
7 Investor Group will not fairly and adequately represent the  
8 interests of the class, either because some of its members are  
9 subject to unique defenses or for any other reason. Thus, the  
10 Accuray Investor Group contends that it should be appointed lead  
11 plaintiff. The Court agrees.

12 Mr. Larson argues that the Accuray Investor Group should not  
13 be appointed lead plaintiff because the group was "created for  
14 purposes of this litigation." Reply at 1. The Accuray Investor  
15 Group is comprised of Zhengxu He, individually and as trustee for  
16 the He & Fang 2005 Revocable Trust and Zhengxu He Roth IRA and the  
17 City of Brockton Retirement System (Brockton). Mr. Larson argues  
18 that one of the members of the Accuray Investor Group, Brockton,  
19 has purported financial losses of \$97,922, which are far less than  
20 his losses of \$186,969. In light of the PSLRA's statement that the  
21 most adequate plaintiff may be "a group of persons," id. § 78u-  
22 4(a)(3)(B)(iii)(I), most courts have concluded that the PSLRA  
23 authorizes plaintiffs to aggregate their losses for purposes of the  
24 lead plaintiff determination. See In re Advanced Tissue Sciences  
25 Sec. Litig., 184 F.R.D. 346, 350 n.11 (S.D. Cal. 1998) (collecting  
26 cases). Thus, the Court will not analyze Brockton's losses

27 \_\_\_\_\_  
28 <sup>2</sup>(...continued)  
have abandoned its motion for appointment as lead plaintiff.

1 separately from Accuray Investment Group's. Because the Accuray  
2 Investor Group's aggregate losses dwarf those of Mr. Larson and the  
3 Lapidus Group, the Court also concludes that, of the parties moving  
4 for appointment as lead Plaintiff, the Accuray Investor Group has  
5 the largest financial interest in the relief sought. Finally, the  
6 Court concludes that the Accuray Investor Group otherwise satisfies  
7 the requirements of Rule 23.<sup>3</sup> On these bases, the Court concludes  
8 that the Accuray Investor Group is the presumptively most adequate  
9 Plaintiff.

10 In addition, the Court approves the Accuray Investor Group's  
11 selection of co-lead counsel. Counsel for the Accuray Investor  
12 Group have demonstrated that they possess extensive experience in  
13 the area of securities litigation, and that they have successfully  
14 prosecuted numerous securities fraud class actions. See Robbins  
15 Decl., Exhs. D, E. However, the Accuray Investor Group's counsel  
16 must work to ensure that their joint appointment does not lead to  
17 the duplication of services, or to an increase in the overall  
18 attorneys' fees and expenses. See In re Donnkenny Inc. Sec.  
19 Litig., 171 F.R.D. 156, 158 (S.D.N.Y. 1997) (approving the  
20 plaintiffs' choice of co-lead counsel on the condition that "there  
21

---

22 <sup>3</sup> "For the purposes of a motion for appointment as lead  
23 plaintiff, a proposed lead plaintiff must only make a preliminary  
24 showing that he or she satisfies the requirements of Rule 23(a)." In re Advanced Tissue Sciences Sec. Litig., 184 F.R.D. at 349. The  
25 Accuray Investor Group has made such a showing. As already  
26 discussed, the factual and legal bases for the class members'  
27 claims are virtually identical. As a result, the claims of the  
28 members of the Accuray Investor Group are typical of the claims of  
the other class members. Furthermore, there is nothing in the  
record to suggest that the interests of the members of the Accuray  
Investor Group are at odds with the interests of the other class  
members, or that the Accuray Investor Group will otherwise fail to  
represent the interests of the class adequately.

1 is no duplication of attorneys' services, and the use of co-lead  
2 counsel does not in any way increase attorneys' fees and  
3 expenses").

4 CONCLUSION

5 For the foregoing reasons, the Court grants Plaintiffs' motion  
6 to consolidate the above-captioned actions. In addition, it  
7 appoints the Accuray Investor Group as lead Plaintiff, and approves  
8 their selection of Coughlin Stoia and Labaton Sucharow as co-lead  
9 counsel (Docket No. 21). The competing motions of Mr. Larson  
10 (Docket No. 19) and the Lapidus Group (Docket No. 10) for  
11 appointment as lead plaintiff are necessarily denied. Plaintiffs  
12 shall file a consolidated amended complaint within twenty days of  
13 the date of this order. Defendants shall respond, with an answer  
14 or a motion to dismiss, twenty days thereafter. If Defendants file  
15 a motion to dismiss, Plaintiffs' opposition will be due two weeks  
16 thereafter and Defendants' reply will be due one week later. Any  
17 such motion will be taken under submission on the papers. The  
18 higher numbered cases will be administratively closed, subject to  
19 later re-opening if necessary for any reason. The Court vacates  
20 the October 29, 2009 hearing and the November 17, 2009 case  
21 management conference. A further case management conference will  
22 be held on April 13, 2009 at 2:00 p.m.

23 IT IS SO ORDERED.

24 Dated: 10/26/09



25 CLAUDIA WILKEN  
26 United States District Judge  
27  
28